

CASE NO. PD-1118-16

IN THE
TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
3/20/2017
ABEL ACOSTA, CLERK

THE STATE OF TEXAS
Petitioner

V.

JAMIE HALLMARK
Respondent

FROM THE TWELFTH COURT OF APPEALS
CAUSE NO. 12-16-00082-CR

ON APPEAL FROM CAUSE NO. 15CR-064 IN THE 349TH
DISTRICT COURT OF HOUSTON COUNTY,
HONORABLE PAM FOSTER FLETCHER PRESIDING

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On December 3, 2015, Respondent entered a plea of guilty to the offense of Hindering Apprehension or Prosecution. The trial court stated it would follow the plea agreement of a sentence of 3 years imprisonment, so long as Respondent appeared for sentencing on January 21, 2016. If Respondent failed to appear at that time, the trial court would consider it an open plea of guilty. The trial court adjudicated her guilty. (R.R. Vol. 2, pp. 8 - 13; C.R. pp. 21-23).

Respondent failed to appear at the sentencing hearing on January 21, 2016. (C.R. p. 24). On March 17, 2016, the trial court sentenced Respondent to 10 years in the Texas Department of Criminal Justice – Institutional Division and assessed a \$1000.00 fine. (R.R. Vol. 3; C.R. pp. 27 – 28).

On August 17, 2016, the Twelfth Court of Appeals sustained Respondent's second point of error, reversed the trial court and remanded for further proceedings, finding error in the trial court's refusal to permit Respondent to withdraw her plea of guilty when it did not follow the plea agreement. The State did not file a motion for rehearing, but filed a petition for discretionary review on September 16, 2016.

STATEMENT REGARDING ORAL ARGUMENT

The Court has stated that oral argument will not be permitted.

ISSUES PRESENTED

ISSUE NUMBER ONE

Appellant [now Respondent] failed to preserve any of the complaints that underlie the court of appeals' opinion.

ISSUE NUMBER TWO

The court of appeals misinterpreted the record and thus misapplied Moore v. State, 295 S.W.3d 329, 332 (Tex. Crim. App. 2009), which held that judges may not play any role in plea negotiation.

ISSUE NUMBER THREE

Moore should be reconsidered or Appellant [now Respondent] should, at least, be estopped from complaining in this case.

STATEMENT OF FACTS

On December 3, 2015, Respondent and the State reached a plea agreement regarding the third-degree offense of Hindering Apprehension and Prosecution. The plea agreement was for a sentence of 3 years in the Texas Department of Criminal Justice – Institutional Division. (C.R. pp. 21-23). The case had been set

for jury trial to begin on Monday, December 14, 2016. The attorneys for the parties had approached the judge with a request that sentencing take place in January, the following month. The trial court stated that it would permit that on the following conditions: 1) Respondent waive her right to a jury so that the case could be removed from the jury docket later that month, 2) if Respondent appeared for sentencing on the scheduled date, the trial court would follow the plea bargain for 3 years, and 3) if Respondent failed to appear and chose not to show at the scheduled date, the trial court would treat it as an open plea of guilty with the full range of punishment available. In responding to the trial court, Respondent stated that is what she had signed up for. (R.R. Vol. 2, p. 8). The trial court accepted her plea of guilty and adjudicated her guilt. Sentencing was set for January 21, 2016. (R.R. Vol. 2, pp. 12 – 13).

Respondent failed to appear at the sentencing hearing on January 21, 2016. (C.R. p. 24). Respondent was arrested on the capias issued by the trial court on January 27, 2016. (R.R. Vol. 3, p.11).

At sentencing, the State request that punishment be assessed at “some amount higher than what we had originally asked for”. (R.R. Vol. 3, p. 8).

Respondent requested that the Court follow the plea agreement and assess punishment at 3 years. (R.R. Vol. 3, p. 8).

The Court sentenced Respondent to 10 years in the Texas Department of Criminal Justice – Institutional Division, and a fine of \$1000.00. Respondent objected to the sentence for being in violation of the 8th Amendment’s prohibition against cruel and unusual punishment, and that the imposition of the sentence rendered Respondent’s waiver of rights and plea of guilty involuntary. (R.R. Vol. 3, p. 9). The trial court overruled the objection. (R.R. Vol. 3, p. 9).

SUMMARY OF THE ARGUMENT

ISSUE NUMBER ONE

In its Issue Number One, the State complains that Respondent waived her complaint on appeal by failing to make a proper objection in the trial court. The State raises this issue for the first time in its petition for discretionary review. The State failed to raise this argument in its brief to the Court of Appeals. The State failed to raise this argument in a motion for rehearing in the Court of Appeals. The State has failed to preserve this issue. Further, Respondent preserved error at the trial court level. Respondent sufficiently apprised the trial court of her objection to the trial court not honoring the plea bargain for a 3 year sentence.

ARGUMENT

ISSUE NUMBER ONE

The State's Failure to Preserve Error on This Ground for Review

In its Issue Number One, the State complains that Respondent waived her complaint on appeal by failing to make a proper objection in the trial court. The State raises this issue for the first time in its petition for discretionary review. The State did not raise this argument in its brief to the Court of Appeals. (See, Brief for the Appellee in the Twelfth Court of Appeals). Nor did the State choose to raise this argument by filing a motion for rehearing in the Court of Appeals.

By failing to raise this argument in the Court of Appeals, the State has failed to preserve this ground of review. See, Tallant v. State, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987) (plurality op.) (“the State must call to the attention of the court of appeals in orderly and timely fashion that an alleged error was not preserved”; “An appellant may not expect this Court to consider a ground for review that does not implicate a determination by the court of appeals of a point of error presented to that court in orderly and timely fashion”); Farrell v. State, 864 S.W.2d 501, 503 (Tex. Crim. App. 1993) (“to ensure that [this Court] reviews only decisions of the courts of appeals, we insist that the parties, in an orderly and timely fashion,

provide the courts of appeals with the first opportunity to resolve the various issues associated with the appeal”).

In its Brief to this Court, the State complains that it was taken by surprise at the court of appeals, because Respondent’s appellate brief did not cite Moore v. State, 295 S.W.3d 329, at 333 (Tex. Crim. App. 2009) in her Point of Error Number Two.

Respondent’s Point of Error No. 2 in her First Amended Brief reads as follows:

“The trial court erred in not setting aside Appellant’s plea of guilty and waiver of her constitutional and statutory rights when the trial court did not follow the plea agreement.”

(First Amended Brief of Appellant in the Twelfth Court of Appeals, p. 6).

In support of this point of error, Respondent’s appellate brief relied on the instruction in Tex. Code Crim. Pro. Art. 26.13, that the trial court “...shall inform the defendant whether it will follow or reject the agreement in open court and before any finding on the plea. Should the court reject the agreement, the defendant shall be permitted to withdraw the defendant’s plea of guilty...”. (First Amended Brief of Appellant, p. 6). Furthermore, her appellate brief cites Ortiz v. State, 933 S.W.2d 102 (Tex. Crim. App. 1996), as follows:

“once the trial court accepted the plea of guilty, it should have bound itself to the plea agreement reached by the State and Appellant. Conversely, once the trial court decided not to follow the plea agreement, it should have set aside Appellant’s waiver and plea of guilty.”

(First Amended Brief of Appellant, p. 12). The Moore court relied heavily on Ortiz in its opinion. Moore, at 332.

Finally, Appellant’s Brief cited State of Texas v. McDonald, 612 S.W.2d 5 (Tex. Crim. App. 1983) for the numerous dangers inherent in the trial court interjecting itself into plea negotiations. (First Amended Brief of Appellant, pp. 11-12).

The State was clearly put on notice as to the basis of Appellant’s Point of Error No. 2, and the basis on which the Court of Appeals made its decision. Additionally, the State’s Brief offers no reason for not filing a Motion for Rehearing in the court of appeals.

Respondent’s Preservation of the Issue at the Trial Court

The State argues in its brief that Respondent failed to properly apprise the trial court of her objection to the 10 year sentence imposed by the trial court. At sentencing, Respondent specifically requested that the trial court honor the plea agreement and sentence Respondent to 3 years. When the trial court instead

imposed a ten year sentence, Respondent objected, stating that the imposition of that sentence rendered Respondent's plea of guilty and waiver of her constitutional and statutory rights involuntary. There is no reasonable interpretation of the foregoing other than that Respondent was objecting to the trial court's refusal to follow the plea bargain process; in that the trial court had accepted Respondent's plea of guilty, used that plea of guilty to find her guilty, and then departed from the plea bargain process. Respondent's complaint was timely when made at the sentencing hearing. See, Moore, at 333. Respondent's complaint sufficiently notified the trial court that Respondent objected to the trial court's departure from the plea bargain process. See, Tex. R. App. Pro. 33.1.

SUMMARY OF THE ARGUMENT

ISSUE NUMBER TWO

The Court of Appeals properly interpreted the record and applied Moore v. State, 295 S.W. 3d 329 (Tex. Crim. App. 2009). In this case, as in the Moore case, the trial court improperly interjected additional terms into the parties' plea agreement.

ARGUMENT

ISSUE NUMBER TWO

Moore v. State limits the trial court's role in the plea negotiation process to advising the defendant whether or not it will follow or reject the bargain between the State and defendant. In Moore, as in the present case, the trial court added the condition that the plea bargain would be converted to an open plea of guilty if the defendant failed to show up at the sentencing hearing. The Moore court made clear that it did not matter whether the added condition was viewed as: 1) the trial court improperly creating its own terms and improperly adding them to the State's plea bargain offer; or 2) merely expressing its intent to follow the plea bargain subject to fulfillment of a separate agreement between the trial court and the defendant. In either scenario, the trial court is required to permit the defendant to withdraw its plea of guilty. Moore, *supra* at 332-333.

The State's reliance on the "other" Moore case, State v. Joshua Moore, 240 S.W.3d 248 (Tex. Crim. App. 2007), is misplaced. In Joshua Moore, it was the State, not the trial court, that imposed the conditional term in its plea offer to the defendant: "It was not the trial judge who imposed these requirements on the appellant; the appellant and the State mutually agreed to these terms." Joshua

Moore, at 253. In this case, as in the Moore case, it was the trial court who interjected additional requirements.

The Court of Appeals correctly applied Moore to the facts of the present case.

SUMMARY OF THE ARGUMENT

ISSUE NUMBER THREE

There are important statutory and policy underpinnings of the Moore v. State decision that would make overruling it improvident.

ARGUMENT

ISSUE NUMBER THREE

There are important statutory protections and policy considerations underlying the Moore opinion. Tex. Code Crim. Pro. 26.13 limits the trial court's participation in the plea bargain process to accepting or rejecting the plea bargain between the State and the defendant. There is no role for the trial court as an active negotiator. The importance of this limitation has long been recognized by the Court. In State v McDonald, 612 S.W.2d 5, 9 (Tex. Crim. App. 1983) the Court set out the reasons for this limitation: 1) the trial court's role as a neutral arbiter is compromised; 2) rejection of the trial court's offer creates the possibility

of prejudice against the defendant; and 3) the trial court's power over the defendant gives it an uneven advantage in the negotiations.

Finally, the State argues that Respondent should be estopped from complaining in this case. The doctrine of contractual estoppel presupposes that the agreement is one that is negotiated by the parties. The Rhodes case cited by the State speaks to estoppel by contract where the requested terms are mutually agreed to by the parties, not interjected by the trial court. Rhodes v. State, 240 S.W.3d 882, 891 (Tex. Crim. App. – 2007). The Joshua Moore court quotes the United Supreme Court for the proposition that the basis of the validity of plea agreements is that "...the terms of the plea agreement are left solely to the parties who are dealing at arm's length." Joshua Moore, at 251. When the trial court interjects terms into the plea bargain process, requests are no longer mutual between the State and defendant, they are imposed by a third party, the trial court; terms are not left solely to parties dealing at arm's length, they are imposed by the trial court; and plea bargains will no longer be a contract between the State and the defendant.

The adoption of this principle in this case would effectively overrule Moore. It ignores those concerns the courts have expressed above about the dangers of allowing the trial court to interject terms into the plea bargain negotiations.

PRAYER

WHEREFORE, PREMISE CONSIDERED, Appellant prays this Honorable Court affirm the judgment of the Twelfth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Tex. R. App. Pro. 9.4(i)(3), in reliance on the word count of the computer program used to prepare this document, the word count of this document is 2, 844.

/s/ William M. Curley
William M. Curley

CERTIFICATE OF SERVICE

I certify that a true copy of Appellant's Reply to State's Petition for Discretionary Review was served in accordance with rule 9.5 of the Texas Rules of Appellate Procedure on each party or that party's lead counsel as follows:

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